No. 15479

United States Court of Appeals

For the Ninth Circuit

ELICK D. TITTMAN, *Appellant,*

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

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STATEMENT ON JURISDICTION

This is an appeal from a judgment dismissing appellant's action for damages for personal injuries, after trial to the court, without a jury, and the entry of Findings of Fact and Conclusions of Law. The suit was brought under the Federal Employers' Liability Act, Title 45 USCA, Section 51, *et seq.* The District Court had jurisdiction of the cause by virtue of Title 28 USCA, Section 1331.

The jurisdiction of the Court of Appeals is invoked under Title 28 USCA, Section 1291.

Reference is made to the pleadings: the Complaint (R. 1), the Findings of Fact and Conclusions of Law (R. 10-15), Objections to Findings of Fact and Conclusions of Law (R. 16-22), and the Judgment of the District Court (R. 8).

STATEMENT OF THE CASE

Appellant filed this action for damages under the Federal Employers' Liability Act for personal injuries alleged to have been sustained by him on June 8, 1955, while in the employ of the appellee. At that time, appellant, a brakeman, was said to be walking between train yard tracks Nos. 12 and 13 in appellee's Hillyard Yards at Spokane, when he claims to have tripped over a piece of baling wire and fell to the ground.

This case came on for trial on December 10, 1956, before the court sitting without a jury. After four days of trial, in which both parties put in their full case and both parties had rested, the court took the case under advisement. On December 31, 1956, the court entered findings of fact, conclusions of law, and judgment dismissing the case on the merits. On January 10, 1957, appellant filed objections to the findings of fact and conclusions of law, motion to amend, and proposed judgment, which were rejected by the trial court.

Appellant has appealed from the final judgment entered in this case on December 31, 1956. In perfecting said appeal, appellant filed his concise statement of points on appeal, in which he set forth the following:

> "The Court erred in failing to find in favor of plaintiff and against defendant in that the evidence conclusively established that defendant was negligent and liable for plaintiff's injuries."

This appeal involves a question of whether or not the trial court erred in finding for the appellee and against the appellant after an adjudication of the merits of the case. The trial court having entered find-

ings of fact pursuant to Rule 52 of the Federal Rules of Civil Procedure, said findings of fact shall not be set aside unless clearly erroneous. More precisely then, the two questions to be determined upon this appeal are:

1. Whether there is any evidence to support the findings of fact;
2. Whether the court erred as a matter of law.

Notwithstanding the above, appellant in his statement of the case would have the appellate court completely disregard the findings of fact and conclusions of law and treat this case as though either a motion for dismissal had been granted at the end of the plaintiff's case or a verdict directed for the defendant had there been a jury. Of course, neither happened in this case. Thus, appellant's statement that the question involved is whether there was sufficient evidence of negligence on the part of appellee to justify submission of the case to a jury, if there had been one, is inaccurate.

The findings of fact and conclusions of law entered by the trial court became the law of the case. Under Rule 41(b) of the Federal Rules of Civil Procedure, the judgment of dismissal, being based upon grounds other than lack of jurisdiction or improper venue, operated as an adjudication upon the merits.

Appellant is not now in a position to insist that this court go behind the findings of fact, conclusions of law and judgment and consider whether the case should have been submitted to a jury, had there been one, merely by reason of certain statements made by the trial court in announcing its oral decision. Moreover, a complete reading of the court's oral opinion, together with the findings of fact and conclusions of law entered

thereafter, make it quite apparent that the trial court did consider all the evidence necessary in arriving at its decision, including the evidence necessary to determine whether or not the doctrine of *res ipsa loquitur* was applicable.

ARGUMENT

I.

Appellant is bound by the Trial Court's Findings of Fact, unless clearly erroneous.

Finding of Fact No. VI (R. 12):

> "That no evidence was presented as to where the coil of wire over which plaintiff testified he fell had come from or how long it had been there. Undisputed evidence was presented that said Hillyard Yards and the area lying between train yard tracks 12 and 13 at the location where plaintiff fell, was inspected and cleaned on June 8, 1955, the day of said accident; and had been inspected and cleaned on June 7th and June 6th, immediately prior thereto. The undisputed evidence further shows that no wire was used by the car repairmen in making light repairs upon railroad cars when located on train yard tracks 12 and 13 and, in particular, in the area in which the plaintiff fell. There was a complete absence of any evidence that wire of any kind had ever been placed, left or even seen at any time in the area in which the plaintiff fell or at any points between train yard tracks 12 and 13."

Finding of Fact No. VII (R. 13):

> "The undisputed evidence was that the area be-

tween train yard tracks 12 and 13, including the area where the plaintiff fell, were clean and free of debris on the afternoon of June 8, 1955, after they had been inspected and cleaned that day."

Finding of Fact No. VIII (R. 13):

"There was no evidence that the defendant: (a) negligently failed and neglected to properly and frequently inspect the Hillyard Yards and keep the same in a neat condition, (b) that the defendant negligently failed and neglected to keep the area or footpath between train yard tracks 12 and 13 clear of wire and other debris, which area or footpath plaintiff was required to use in the performance of his duties, (c) that the defendant carelessly and negligently placed, left or allowed to remain, the coil of wire heretofore referred to in the area or footpath which plaintiff used while inspecting the train upon which he was working, (d) that the defendant negligently failed and neglected to warn or advise the plaintiff of the existence of said coil of wire prior to the time that the plaintiff was required to work in said area or footpath."

Based upon these Findings of Fact, the court made, among others, the following Conclusions of Law:

Conclusion of Law No. III (R. 14):

"That the evidence was insufficient to impute either actual or constructive notice to the defendant of the existence of said wire, so as to render it negligent merely by reason of its being there when plaintiff tripped over it."

Conclusion of Law No. IV (R. 14):

> "That the doctrine of *res ipsa loquitur* is not applicable under the evidence presented in this case."

Conclusion of Law No. V (R. 14):

> "That any injuries or damages which the plaintiff may have sustained as a result of said fall were not proximately caused by the negligence of the defendant in failing to exercise reasonable care in the inspection and maintenance of its yards where the plaintiff was required to work or in providing him with a reasonably safe place in which to work."

This is an action at law for damages. Thus, as heretofore stated, Rule 52 expressly provides:

> "Findings of fact shall not be set aside unless clearly erroneous, . . . "

The adoption of this rule by the Supreme Court was merely a restatement of the overwhelming weight of authority established in a long line of Federal cases. Thus, the following tenets have been so clearly established by legions of Federal cases that they should hardly require citation of authority in support thereof:

> (1) Findings of fact by a court sitting without a jury are equivalent to a verdict, and hence will be disturbed only when they appear clearly erroneous, or show that the judge was influenced by improper motives, or misunderstood the evidence.
>
> (2) Trial Judges' findings are never to be lightly disturbed by a reviewing court.

(3) A court of appeals must accept findings of fact unless clearly and manifestly wrong.

(4) Findings of trial judge on questions of fact should be given great weight.

(5) Findings of trial court on issues of fact will not ordinarily be disturbed except for obvious errors in the application of the law, or serious mistake in the consideration of the proof.

(6) If there is any substantial evidence to support the finding of the trial court, the appellate court in a proceeding in error will not consider the weight of the evidence.

(7) Weight of evidence is not for consideration by appellate court, where the conclusions of the trial judge are supported by evidence.

(8) In a law action tried without a jury, fact-finding contrary to weight of evidence is error of fact not reviewable.

(9) Findings of fact based on conflicting evidence will not be disturbed on appeal unless against the clear preponderance of the evidence.

(10) Findings of fact on conflicting evidence will not be disturbed where supported by substantial testimony.

(11) A reviewing court will not disturb the finding of the court below, where evidence submitted there leaves a question of fact in doubt.

(12) A finding by the court on conflicting evidence has the force of a verdict, and will not be disturbed on appeal.

(13) Findings by court sitting without a jury will be taken as true if supported by any substantial evidence.

(14) The trial judge's findings on pure matters of fact or mixed matters of law and fact, are alike conclusive when supported by submissible evidence.

And where there is evidence to justify the trial court's findings, the appellate court is not concerned with the mental processes of the trial court. *Wessel v. United States,* 49 F.(2d) 137. Errors alleged in findings of court are not subject to revision if there is any evidence upon which such a finding could be made. *United States v. Washington Dehydrated Food Co.,* 89 F.(2d) 606. In fact, it has been held that judgment for defendant on facts found can be erroneous only when judgment for plaintiff is imperative. *Luttrell v. United States,* 41 F.(2d) 517, affirming *Petree v. United States,* 34 F.(2d) 563, certiorari denied 51 S.Ct. 82, 282 U.S. 877, 75 L.ed. 775.

Appellant can prevail in this case, then, only upon a showing that there was an error of law committed, or that the findings are clearly erroneous. He cannot go back of the judgment and findings and create a reviewable issue for this court on the question of whether or not there was evidence which could have been submitted to a jury, had there been a jury. The trial court was the trier of the facts, and performed the duties and function of the jury. The mere fact that the evidence was such that the court, in commenting on the evidence, was prone to say that there was not even sufficient evidence of negligence to submit to a jury, had there been

one, cannot convert this case into a mere review of that issue. Indeed, the appellant himself recognizes that fact, for in spite of his ingenious argument, he does not ask that this court remand the case for the purpose of the trial court making additional findings of fact, or a new trial, but asks that this court find for the appellant, and order the entry of a judgment in his favor. In doing so he attacks the accuracy of the court's Findings of Fact VI, VII and VIII, and relies upon disputed or conflicting testimony as to whether wire of the type described by the appellant was used by the railroad. Thus, while he in one breath contends that the court erred for not considering all the evidence, he in the next breath tacitly admits that the court considered all the evidence necessary to arrive at its decision, when he attacks findings of fact which must have been based upon disputed or conflicting evidence if his contention is correct.

The mere fact that a trier of the facts might feel that the evidence was not even strong enough to submit the issue of negligence to the jury, if there had been one, does not remove the effect to be given to its findings of fact entered in support of its judgment, especially where said findings of fact are made and based upon all of the evidence necessary to consider in making them, and at the conclusion of the entire case. Such a belief, if anything, makes all the more binding and conclusive the trial court's findings of facts, unless those findings themselves were clearly erroneous.

Actually, what appellant is really arguing is the weight to be given particular evidence, which, of course,

is not a matter which this court will consider on appeal. As was said in *United States v. Gamble-Skogmo,* 91 F.(2d) 372, when an action at law is tried to the court, the court's fact findings are conclusive in courts of review, no matter how convincing the argument that findings should have been different under the evidence. Where the court's findings of fact in a law action tried without a jury are based upon substantial evidence, they are conclusive upon the appellate court, no matter how convincing the argument be that upon the evidence the findings should have been different. *Davies v. Home Trust Co.,* 83 F.(2d) 124. The weight of the testimony is not for consideration by the appellate court, where the conclusions of the trial judge are supported by the evidence. *Aetna Ins. Co. of Hartford, Conn. v. Licking Valley Milling Co.,* 19 F.(2d) 177, certiorari denied 48 S.Ct. 37, 275 U.S. 541, 72 L.ed. 415. Where there is substantial evidence to support the finding of the trial court, it is immaterial that the appellate court might differ with the processes of reasoning employed by the trial court to reach said finding. *Conqueror Trust Co. v. Fidelity & Deposit Co. of Maryland,* 63 F.(2d) 833. The long and short of it is, that the appellate court will not substitute its judgment for that of the trier of the facts, where there is any substantial evidence to support the trial court's findings.

Nor will it avail appellant to contend that by reason of the statement of the trial court in his oral opinion that he was granting the defendant's motion for dismissal on the grounds of the insufficiency of the evidence, that this court must now determine whether or

not the evidence considered in a light most favorable to the plaintiff presents a prima facie case for relief. No motion was made to dismiss this action at the end of the appellant's case. At the end of the trial, appellee's counsel did move to dismiss the case on the grounds of the legal insufficiency of the evidence. The court noted the motion for the record, and thereafter appellant's and appellee's counsel fully argued the merits of the case, based upon all the testimony, in their closing arguments. And the court in deciding the case and entering its findings of fact and conclusions of law considered the case on its merits. While at one point in its oral opinion the trial court did indicate that he was going to grant the motion to dismiss, it is obvious when the whole opinion is read that the court thoroughly weighed and considered all the evidence necessary to decide the case on its merits.

But even if we were to assume for the sake of argument, that this situation was similar to that where a motion for dismissal is made at the end of the plaintiff's case, this Circuit together with the Sixth and Seventh Circuits, has firmly held that on such a motion the court has the power to finally dispose of the case and that it is its duty to do so. See *Gary Theatre Co. v. Columbia Pictures Corporation,* 120 F.(2d) 891 (C.C.A. 7); *Young v. United States,* 111 F.(2d) 823 (C. C.A. 9); *Bach v. Friden Calculating Mach. Co.,* 148 F.(2d) 407 (C.C.A. 6). In *United States v. Borden Co.,* 111 F. Supp. 562, the plaintiff contended that the court in disposing of an involuntary motion for dismissal at the end of plaintiff's case was precluded from weighing the evidence. The court in considering the

question, quoted from *Allred v. Sasser,* 7th Circuit, 170 F.(2d) 233, 235, as follows:

> "The trial court was the trier of the facts, and in considering the evidence was not bound to view it in a light most favorable to the plaintiff, with all attendant favorable presumptions, but was bound to take an unbiased view of all the evidence, direct and circumstantial, and accord it such weight as he believed it entitled to receive."

See also *United States v. Bartholomew,* 137 F. Supp. 700.

II.

There is substantial evidence to support the findings and conclusions.

With the foregoing in mind let us now turn to the facts to determine whether or not there is any substantial evidence upon which to support the trial court's findings of fact and conclusions of law.

Appellant's action was based upon a charge of negligence on the part of the appellee in the maintenance of its Hillyard Yards at the point where the accident occurred. Specifically, in paragraph IV of the complaint (R. 3), appellant alleged negligence of the appellee as follows:

> "(a) That defendant in violation of the aforesaid rule, negligently failed and neglected to properly and frequently inspect the aforesaid yards and to keep the same maintained in a neat condition.

(b) That the defendant negligently failed and neglected to keep the foot path alongside the track where said train was about to depart, clear of wire and other debris which was scattered along said foot path, which plaintiff was required to use in the performance of his duty.

(c) That defendant carelessly and negligently placed the aforesaid coil of wire on said foot path and permitted the same to be placed and remain there and did remain there for a sufficient length of time where defendant in the exercise of care and diligence could have discovered the same in time to remove it from the pathway alongside said track which the plaintiff has to pass upon in the performance of his duties.

(d) That defendant negligently failed and neglected to warn or advise plaintiff to be on the lookout for said coil of wire and other debris prior to the time plaintiff was required to use said footpath."

The trial court held that plaintiff failed to prove this alleged negligence. The court based its holding partly on testimony of the appellant himself, and partly on testimony of appellee's witnesses; particularly that portion of the testimony pertaining to the inspection and cleaning of the yards. It was conceded by all, including the appellant, that no one knew where the coil of wire over which appellant testified he fell had come from or how long it had been there (R. 178). At the same time, undisputed evidence was presented that the area in which the accident occurred was inspected and

cleaned on the morning of the day of the accident and had been inspected and cleaned on the two previous days (R. 350, 360, 368, 373, 374, 393). The undisputed evidence further showed that no wire was used by the car repairmen in making light repairs upon the railroad cars in the area in which the appellant fell (R. 386). There was a complete absence of any evidence that wire of any kind had ever been placed, left or even seen at any time in the area in which the appellant fell, or at any points between train yard tracks 12 and 13, except for the piece of wire which the appellant himself testified caused him to fall (R. 368, 407, 413). There was, in addition, undisputed evidence that the area between the train yard tracks where the appellant fell were clean and free of debris on the afternoon of the day he fell (R. 391, 410), after they had been inspected and cleaned that day.

Based upon that evidence, the trial court's findings are clearly not erroneous.

Under the Federal Employers' Liability Act, 45 U. S.C.A., Section 51 *et seq.,* a defendant employer can be held liable only for negligence proximately causing the injury. *Northern Pacific Railway Company v. Mely* (9th Cir.), 219 F.(2d) 199; *Wilkerson v. McCarthy,* 336 U.S. 53, 69 S.Ct. 413, 93 L.ed. 497. Liability cannot be predicated upon mere speculation. *Tennant v. Peoria & Pekin Union R. Co.,* 321 U.S. 29, 64 S. Ct. 409, 88 L. ed. 520; *Brady v. Southern R. Co.,* 320 U.S. 476, 64 S. Ct. 232, 88 L.ed. 239; *Campbell v. Southern Pac.,* 120 Or. 122, 250 Pac. 622. In *Tennant v. Peoria & Pekin R. Co., supra,* the Supreme Court stated at page 32:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident." (Citing cases.)
>
> "Petitioner was required to present probative facts from which the negligence and the casual relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts. after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' " (Citing cases.)

The duty of the appellee in connection with the maintenance of its train yard at Hillyard was not an extraordinary one. The Hillyard Yards are large. Many trains operate in and through it, including trains of the Spokane, Portland & Seattle Railway (R. 179). Its duty was to exercise reasonable and ordinary care in view of all the circumstances. The common law rules for determining negligence on the part of an employer towards his employee are controlling on the question as to what constitutes negligence on the part of the employer. *McGivern v. Northern Pac. Ry. Co.,* 132 F.(2d) 213.

The defendant is not the insurer of the safety of its employees and is not under any obligation to keep the premises absolutely safe. *Patton v. Texas & P. R. Co.,* 179 U.S. 658, 21 S.Ct. 275, 45 L.ed. 361; *McPherson v. Oregon Trunk Ry.,* 165 Or. 1, 102 P.(2d) 726.

Failure to guard against the bare possibility of accident is not actionable negligence. *Brady v. Southern R. Co., supra.* The plaintiff must present more than a mere scintilla of evidence of negligence. Substantial evidence is required. *Poe v. Illinois Cent. R. Co.,* 335 Mo. 507, 73 S.W.(2d) 779.

Applying the evidence in this case in a light even most favorable to the appellant, the only evidence we have is that appellant tripped over a coil of wire while walking alongside of a box car in the Hillyard Yards at Spokane. There is no evidence as to how the coil of wire got there, how long it had been there, that the appellee or any of its employees knew it was there, or that the appellee or its employees had a reasonable opportunity to discover and remove it.

Before appellant's evidence is sufficient to constitute an unsafe place to work or negligence upon the part of the appellee, a showing must be made one way or another that the railroad permitted the coil of wire to be left along its tracks, well knowing that it would constitute a danger to workers in that area. *Brown v. Western Railway of Alabama,* 338 U.S. 294, 94 L.ed. 100; *Bailey v. Central Vermont R. Co.,* 319 U.S. 350, 87 L.ed. 1444.

In *Thompson v. Thompson,* 362 Mo. 73, 240 S.W. (2d) 137, the court reversed a verdict for the plaintiff for injuries sustained when he slipped on the deck or apron of an engine by reason of oil being present thereon, which plaintiff alleged that the railroad had actual or constructive knowledge of the presence thereof. It said at page 140:

"In short, the only evidence concerning oil is that there was some on the apron after Mr. Thompson fell. He saw it and his helper saw it and cleaned it up. But when the oil got there, how it got there and how long it had been there is not to be even conjectured from a single circumstance in the record. The jury's ultimate conclusion and findings of notice, *Schonlau v. Terminal R. Ass'n of St. Louis,* 357 Mo. 1108, 212 S.W.(2d) 420, rests solely on the two circumstances that the engine was in the yards, 'on the spot,' from 10:30 until 3:30 and that the presence of oil upon the apron after Mr. Thompson fell. All the evidence negatives any possible inference that the oil got on the apron through the agency of any employee and therefore there is no possible basis for the necessary inference that the railroad had or could have had notice of its presence.

"In this view of the case it is unnecessary to determine whether the instructions were erroneous or whether the verdict was excessive. Upon the entire record there was a complete absence of probative facts to support the essential conclusion that the railroad had notice, actual or constructive, of the presence of the oil, and, therefore, the trial court erred in refusing to direct a verdict for the defendant. Accordingly, the judgment is reversed."

The duty of the railroad in this instance was no different than that of any other owner or proprietor of premises who has a duty of maintaining the premises in a reasonably safe condition. As stated by the trial

court (R. 655), there is no reason for applying a different rule than that that would be applied to the owner of a store where the patron used its aisles as a brakeman would use the space between the railroad tracks in the performance of his duties. Thus, the decisions of the Washington State Supreme Court on the question of negligence and notice in connection with the duty of a proprietor of a business providing a reasonably safe place for his patrons to travel while upon his establishment became pertinent in this case. In *Mathis v. H. S. Kress Co.,* 38 Wn.(2d) 845, 232 P.(2d) 921, the court held that the very fact that there was liquid on the floor which caused the patron to slip and fall did not prove negligence of the owner, since there was an absence of proof as to how long it was there and how it got there. The court stated that where negligence is predicated upon the failure to keep one's premises in a reasonably safe condition it must be shown that either the condition had been brought to the owner's attention or had existed for such a time as to have afforded him sufficient opportunity in the exercise of reasonable care to become cognizant of and to have removed the danger.

The appellant attempts to avoid the inescapable conclusion that the appellee had no notice of the existence of this wire, by contending that the doctrine of *res ipsa loquitur* applies. In essence he contends that merely because the appellant was employed in the appellee's train yards at the time of the accident, that the doctrine automatically applies. He asserts that because the appellant testified the wire was coiled, such testimony constitutes evidence that the wire had been placed or left

there by the appellee's employees. He further asserts that because the wire was rusted, that amounts to evidence that the wire had been there for some time.

This completely disregards the obvious fact that wire, especially baling wire, has a natural tendency to coil. The mere fact that it was found coiled is not evidence of anything. It is as equally probable that it came coiled from the factory as to assume that it was coiled by an employee of the appellee. Certainly it is not evidence that it had been placed or left at this particular spot by an employee of the appellee. As stated by the trial court (R. 659), this baling wire could have been there without negligence on the part of the railroad. It could just as well have fallen from another car as having been placed or left there (R. 661). As a matter of fact, the inference if any to be drawn from the fact that it was there, would be that it would be more likely that it had fallen off another car, because no one had ever seen any wire laying between the tracks in the area where this accident occurred. Surely it would be sheer speculation to conclude that because wire is coiled where it is found, that it was necessarily placed or left at that point by human hands.

Likewise, it is sheer speculation to conclude that because wire appears rusty, it must have been at the particular location where it is found for several days. Again, as the trial court pointed out, it could just as well have rusted on a flat car or on any other object on which it may have been used by someone other than the appellee (R. 661). If it had been exposed to the air and the elements for a comparatively short time, it would rust. When this piece of wire became rusted, no-

body knows. Surely more than the mere discovery of a piece of rusted wire is required to prove actionable negligence, even under the most liberal interpretation of the Federal Employers' Liability Act. And this is especially so, when the evidence and reasonable inferences to be drawn therefrom is to the effect that this type of wire was not used by railroad men at this location in the yards in connection with any work that they might do; and the further fact that no one had ever seen or found any such wire in this part of the yards.

III.

The doctrine of *res ipsa loquitur* is not applicable.

In order for the doctrine of *res ipsa loquitur* to apply, the following elements must be present:

1. The accident is of such a nature that it would normally not happen if due care is used. *Delaware Dredging Co. v. Graham,* 43 F.(2d) 852.

2. The accident is of such a nature that according to ordinary human experience it could not have happened without negligence. *Yazoo & M. V. R. Co. v. Skaggs,* 181 Miss. 150, 179 So. 274.

3. The thing that causes the injury is under the exclusive control and management of the defendant at the time the accident occurs. *Jesionowski v. Boston & Maine Railroad,* 329 U.S. 452, 67 S. Ct. 401, 91 L.ed. 416.

The doctrine applies only where on proof of the occurrence and the injury, the existence of negligence or fault is the more reasonable probability, and must not be allowed to prevail where, on proof of the occurrence

without more, the matter rests only in conjecture. *Dail v. Taylor,* 151 N.C. 284, 66 S.E. 135. Thus, the mere happening of an accident and injury to an employee does not justify the inference of negligence, and the doctrine of *res ipsa loquitur* does not apply. *Foquet v. New York Central & H. R. R. Co.,* 53 Misc. 121, 103 N.Y. Supp. 1105.

Applying these tenents to the facts in the instant case, it would seem obvious that the doctrine cannot apply. Certainly this accident could have happened without negligence on the part of anyone. The facts do not "speak for themselves," as has been so often said in the case of *res ipsa loquitur.* There was nothing extraordinary about this accident. As the trial court held, this coil of wire could as easily have been there as a result of falling off a car as it could have by being placed there by an employee of the railroad. In fact, from the testimony, the great likelihood is that it was not placed there by any employee, since no such wire was used by any such employee in that area in connection with their railroad work.

The appellant, of course, would not argue that the exercise of due care in the inspection and cleaning of the area between the tracks by the railroad would completely prevent the possibility of this wire being there at the time the appellant fell. Therefore, the doctrine can be of no help to him in furnishing otherwise lack of proof as to how long the wire had been there. The respondent could have exercised even more than ordinary care in the inspection and cleaning of its yards and yet it would be entirely possible for the wire to have been there at the time that appellant fell.

Even more important, is the fact that there is no proof whatsoever that the thing or agency which caused the appellant to fall was under the exclusive control and management of the respondent, at the time of the accident. Thus, one of the most important elements required before the doctrine can even be applicable, is missing in this case. Evidence as to where this baling wire came from, or how it got there, or how long it had been there, is completely lacking. *Res ipsa loquitur* cannot be used to supply the missing evidence to create the requirements necessary before the doctrine becomes applicable. As said in *Batson v. Western Union Telegraph Co.,* 75 F.(2d) 154, *"res ipsa loquitur"* applies only when the thing shown speaks of negligence on the part of the defendant, not merely of the occurrence of an accident.

In *Martin v. Southern Pac. Co.,* 46 F.Supp. 957, the defendant had made a reasonable inspection of a freight car that did not belong to it before delivery of the car to the consignee. At the time of the accident the railroad was not in exclusive control thereof. Accordingly, the court held that the doctrine of *res ipsa liquitur* was not applicable. The court held that it was just as reasonable to assume from the evidence that the accident might have been caused by third parties over whom the railroad had no control, as it was to assume that it was caused by negligence on the railroad's part.

In *McPherson v. Oregon Trunk Ry., supra,* a night watchman employed to patrol the tracks of the railroad constructed through a cut in solid rock, was injured by falling rock. He alleged negligence on the part of railroad by reason of the rock falling. He also alleged neg-

ligence by reason of the presence of spikes protruding from the ties, which he claimed impeded him from running to escape the falling rock. The court held that the doctrine of *res ipsa loquitur* was not applicable. It said the cause of the rock falling rested on sheer speculation. It also held that there was no evidence that the railroad had, prior to the injury, notice of the presence of the spikes which allegedly protruded from the ties and impeded the watchman's running to escape the falling rock.

In *Oelschlaeger v. Hahne & Co.* (S.Ct. N.J.) 66 A. (2d) 861, a customer tripped and fell over a stool, placed or left by a counter of a department store. The only evidence was that the stool was used by clerks in the shoe department. How it got by the counter and how long it had been there was not shown. The court held that the doctrine of *res ipsa loquitur* was inapplicable to raise an inference of negligence. It held in effect that if it is just as reasonable to infer that the stool got there by other means than the act of one of the store employees, then the doctrine cannot be invoked.

The *res ipsa loquitur* doctrine does not raise a presumption of negligence, but merely warrants an inference thereof, where the accident would not likely have happened but for negligence. *Fick v. Pilsener Brewing Co.,* 151 Ohio S.T. 555, 86 N.E.(2d) 616. Thus, where the accident could have happened without negligence, there first must be some basis of negligence before the inference is warranted.

As said in *Levine v. Union & New Haven Trust Co.,* 127 Conn. 435, 17 A.(2d) 501, the *res ipsa loquitur* doctrine has no evidential force, does not shift the burden

of proof, and does not give rise to a presumption or compel the trier of the facts to draw an inference of negligence.

And even where the doctrine is applicable, it cannot be substituted for evidence of negligence. As succinctly stated by the Supreme Court of the United States in *Sweeney v. Erving,* 228 U.S. 233, 33 S.Ct. 416, 57 L.ed. 815 (and cited with approval in the recent case of *Jesionowski v. Boston & Maine Railroad, supra*):

> "*Res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict."

Thus, under the most favorable consideration of the appellant's argument; *i.e.,* that the doctrine of *res ipsa loquitur* applies in this case, no court has gone as far as he would contend. That is, merely because the doctrine might apply, that the trier of the facts is then compelled to find for plaintiff. He would simply brush aside the evidence and findings of the trier of the facts and insist that because the doctrine of *res ipsa loquitur might* raise an inference, that the court is then compelled to find the appellee negligent and enter a judgment for the appellant.

To sustain his position that the doctrine of *res ipsa loquitur* must be applied, appellant asserts on page 14

of his brief (without reference to the record) that the wire on which appellant tripped was similar in appearance to that used by appellee on its trains. The record will not support the contention that a wire similar in appearance to that which the appellant described was even used by the railroad. Appellant himself described this wire as "baling wire." The evidence was that baling wire was foreign to the railroad (R. 387), that it was never used (R. 394, 395).

In an effort to discover some wire used by the railroad, testimony was elicited that two other types of wire, not at all like baling wire, were sometimes used. Neither of these wires, however, were ever used on the train yard tracks or in the area where appellant fell, or ever used in connection with any work that might be performed in that area. One of the wires, stovepipe wire, is a much thinner wire than baling wire (R. 399). The evidence was that it was never used in this area, but only out on the line in the case of emergency or out on the repair (rip) track or the shop (R. 367, 368, 403).

The other wire, No. 9 wire, which is much heavier than baling wire (R. 395) was only used in connection with stakes on loads of poles. This use was not made on or near the train yard tracks, but out on the repair (rip) tracks (R. 413). Thus, neither of these wires were either similar to the wire which the appellant himself described, nor were they a type of wire that was apt to be found along the train yard tracks since no use of them was made in that area.

Based upon the above unfounded assertion, together with the fact that the wire was described as rusty and

that other debris was seen to be removed from the Hillyard Yards in general, several months after the accident, appellant maintains that the evidence would justify the application of the doctrine.

Without any more, the appellant then assumes that the appellee was negligent and insists that it was then required to produce evidence to explain its apparent negligence. In so assuming, of course, he is assuming another false premises, *i.e.*, that the accident could not have happened, but for the negligence of the appellee. Instead, even if we were to assume that the doctrine was applicable under those facts, it would only raise an inference as to the possible notice which the railway company might have had of the existence of this wire. Neither the trial court nor this court would be compelled to infer notice in the face of testimony that this area was not only inspected and cleaned on the morning of the accident (R. 350, 368), but that it was found to be clean on the afternoon of the accident (R. 390, 391, 410), and that no one testified that thereafter there was any evidence of any wire in this area which the appellee knew of or should have known of by reasonable inspection and maintenance.

Appellant further assumes that it is reasonable to infer negligence in the manner in which the inspection and cleaning was performed. He contends that the appellee failed to prove that the inspections were performed with due care. Again, he prefers to disregard or overlook the evidence that not only was no wire found in this area (R. 368, 407), but that after the area had been inspected and cleaned on the day of the accident it was found to be clean on the same afternoon of the

day that it had been inspected and cleaned (R. 390, 391, 410). What better evidence that due care was used in the performance of these duties than testimony that after they had been performed the area was clean and free of *any* material, not only wire (R. 410). If further evidence were needed, the testimony of Witness James that this particular area is generally very clean (R. 407) should suffice. Surely, an inference that due care was not exercised need not nor cannot be drawn from this evidence.

Notwithstanding all this, appellant contends in his brief that the great weight of the evidence supports the conclusion that the appellee was negligent in permitting a coil of wire to *fall* to a pathway in its yard and in failing to exercise due care in inspecting and cleaning the pathway. By that very statement appellant acknowledges a change in his position from that on which the cause of action was based; *i.e.,* the complaint, and in fact the evidence at the trial of the case. Appellant did not rely on general negligence, but specifically pleaded and argued at the time of trial that the appellee was negligent in (a) failing to properly and frequently inspect its yards and to keep the same in a neat condition; (b) failing to keep its footpath clear of wire and other debris; (c) negligently *placing* the coil of wire on said footpath and permitting the same to be *placed* and remain there for a sufficient length of time for the appellee in the exercise of due care to have discovered the same and remove it; and (d) in failing to warn the appellant to be on the lookout for said wire. It has long been recognized that where the plaintiff's evidence or basis of negligence

arises out of specific acts of negligence, then the doctrine of *res ipsa loquitur* is not applicable.

Palmer v. Brooks, 350 Mo. 1055, 169 S.W.(2d) 906;

Winslow v. Ohio Bus Line Co., 148 Ohio S.T. 101, 73 N.E.(2d) 504;

Van Houten v. Kansas City Public Service Co., 233 Mo. App. 423, 122 S.W.(2d) 868;

Sims v. Dallas Ry. & Terminal Co. (Tex. App.), 135 S.W.(2d) 142;

Bewley v. Western Creameries, Inc., 177 Okl. 132, 57 P.(2d) 859.

As stated in *Harke v. Haase,* 335 Mo. 1104, 75 S.W. (2d) 1001, the principal difference between a *res ipsa loquitur* case and a specific negligence case is that in the former the ultimate fact of some kind of negligence is inferred without any evidential fact except unusual occurrence itself, while in the latter there must be evidential facts sufficient to show some negligent acts or omissions which were the proximate cause of the occurrence.

IV.

Criticism of Cases Cited by Appellant

Whatever may have been the law of England, as enunciated in *Byrne v. Boadle,* 2 H. & C. 722, 159 Eng. Repr. 299, in 1863, the law pertaining to the doctrine of *res ipsa loquitur* which this court will apply is based upon the decisions of State and Federal courts in applying said doctrine in negligence cases.

Rogers v. Mo. Pac. R. Co., 352 U.S. 500, and *Webb v. Illinois Central R. Co.,* 352 U.S. 512, were not concerned with the doctrine of *res ipsa loquitur.* Appellant acknowledges that fact, but cites those cases as indicative of the liberal policy of the Supreme Court in determining what evidence will be sufficient evidence of negligence to submit a case to the jury. Of course that is not our problem here. This case was submitted to the trier of the facts and was determined by the trier of the facts at the end of the entire case. Nor did those decisions change the law of negligence, for at the same time the Supreme Court decided *Herdman v. Pennsylvania R. Co.,* 352 U.S. ....., 77 S. Ct. 455, 1 L.ed (2d) 508, where it affirmed a directed verdict for the railroad, holding that a jury question of negligence was not presented by the proofs. More significant, the court also held in the *Herdman* case that *res ipsa loquitur* was not applicable on the ground that the proof did not meet the test laid down by the Supreme Court in the *Jesionowski* case, wherein it held *that the occurrence had to be extraordinary, so that when it occurs, a jury may fairly find that it occurred as a result of negligence..*

The facts in *Baltimore & O. R. Co. v. Flechtner,* 300 Fed. 318, certiorari denied 266 U.S. 613, upon which appellant heavily relies, are somewhat different from those in the instant case. There the barrel hoop over which plaintiff fell came from a keg of railroad spikes. It was apparently further shown that there was little or any likelihood that the hoop would have been where it was except by reason of having been left or placed there by railroad employees. No evidence of

inspection was indicated in the opinion. Even so, all that the court said was that these were questions for the trier of the facts. The court did not say that said facts constituted negligence or conclusively showed that the plaintiff was entitled to recover.

The *Kast* case is even more distinguishable *(Baltimore & O. R. Co. v. Kast,* 299 F.(2d) 419, certiorari denied 266 U.S. 613). There the socket wrench which was lying in the path was the kind of tool that was used by the employees in their work in the area in which the plaintiff was injured. The court further went on to find that it was not the kind of a tool that would normally be transported. The court further found that it was not equally logical to assume that the wrench fell on the path from a conveyance carrying tools, without there being any negligence accompanying such fall. This was for the reason that there was no evidence that tools were trucked along this path, but presumably were carried by the workmen. Even so, the court said, if it had been trucked it would be difficult to see how, without negligence, either in the loading or the hauling, a tool of this size would fall off unobserved.

The fact that the wrench was used only by the machinist, who worked in this area, and thus was within the exclusive control of the railroad, together with the improbability of it having fallen in this location, led the court in the *Kast* case to allow the case to be *submitted to the jury* on the basis of *res ipsa loquitur* In doing so, however, it reiterated the rule that a mere conjecture, standing upon a basis of uncertain inference, does not make substantial evidence. Such a case

lacks both the quantitive and qualitive essential minimum. Citing *Copeland v. Hines,* 269 Fed. 361.

Nor can the appellant find any comfort in *Waller v. Southern Pacific Terminal Co.,* 178 Or. 274, 166 P.(2d) 488. In that case the court reversed a verdict for the plaintiff on the ground that there was no substantial evidence of negligence on the part of the defendant. The facts and testimony were quite similar to the case at bar. The Supreme Court of Oregon extensively reviewed the evidence concerning the alleged acts of negligence and the matter of inspection and cleaning of the yard. It found, as the trial court did here, that the area in which the plaintiff fell had been inspected and cleaned on the very day of the accident and had been found to be clean after said inspection. As here, it found that there was no evidence as to how the splinter of wood got there, where it came from, or how long it had been there. It further noted that from the evidence, it may have fallen from the train which the plaintiff was boarding. It found that there was not a scintilla of evidence that the defendant ever placed or caused to fall into its yard any sticks or debris of the type over which the plaintiff fell.

Based upon this evidence the court found that even considering the evidence in a light most favorable to the plaintiff, there was no substantial evidence of negligence. On the question of inferences it said at page 496:

> "As we have said, in determining whether there was substantial evidence of negligence proximately causing plaintiff's injury, it is our duty to con-

sider the testimony in the light most favorable to the plaintiff; but it is also our duty to give consideration to evidence adverse to the plaintiff's contention where it is wholly undisputed and uncontradicted and relates to matters of fact as distinguished from mere inferences. Where a plaintiff's case is based upon an inference or inferences only, that case must fail upon proof of undisputed facts inconsistent with such inferences. *Pennsylvania Railroad Co. v. Chamberlain,* 288 U.S. 333, 53 S.Ct. 391, 77 L.ed. 819."

It also held at page 498, that the general rule concerning the duty owed by the owner of land to persons employed or invited thereon applies in this type of case. It said:

"The duty of the defendant under the F.E.L.A. is the same as the duty of a proprietor to invited guests as far as the rule now to be considered is concerned."

After citing Oregon cases on the question of the duty of a proprietor, it also held at page 499 as follows:

"Since there is no evidence that the defendant caused any dangerous condition on any part of the 'O' yard, it can be held liable, if at all, only upon the theory that it negligently failed to remove an object, or objects, deposited there by others. Assuming that the plaintiff stepped on a stick, there is no evidence that the defendant knew of its existence, nor is the defendant chargeable with constructive notice that any stick was on the ground at the point where plaintiff slipped for there is no

evidence as to how long the stick, if any, had been there."

In the *Waller* case, as in the instant case, there was evidence that other railroads used the yards. (Here, the Spokane, Portland & Seattle Railway used the Hillyard Yards (R. 179)). There, the Oregon-Washington Railroad & Navigation Company also used the yards.

As to distinguishing the *Flechtner* case (*Baltimore & O. R. Co. v. Flechtner,* 300 Fed. 318), the Oregon court merely noted that the court in the *Fletchner* case held that the rusty condition of the hoop justified submission of the case to the jury, on the question of constructive notice. This was because, the court said, the evidence tended to indicate that the defendant railroad, and not any other third person, had placed the hoop between the tracks, where it had also noted that hoops such as this were found on kegs of railroad spikes, which the railroad admittedly used.

A close reading of the cases cited by appellant in his opening brief on page 12, fails to disclose any mention whatsoever of the doctrine of *res ipsa loquitur,* with the exception of the case of *Howard v. Pennsylvania R. Co.,* 43 Ohio App. 96, 182 N.E. 663, which will be discussed hereafter. All that the other cases merely stand for is, the proposition that the question of negligence was for the jury. As to the thing over which the plaintiffs in those cases tripped, the evidence in each case either indicated that it was an item regularly used by the railroad in that area, so as to automatically impute notice to the railroad, or was in such a condition that it obviously had been there for some time.

In the *Howard* case, where it was held that the doctrine of *res ispa loquitur* applied, the plaintiff was injured when the speeder upon which he was riding was derailed due to striking a jack block on the rail. The court pointed out that there was evidence that a jack block had been used by the railroad on this very track a short time before the accident, and that jack blocks were regularly used by the railroad in this area. Thus, the factual situation on notice was completely different.

The cases which appellant cites to support the use of the doctrine of *res ipsa loquitur* have not applied that doctrine to furnish the facts upon which the negligence itself must be predicated. In *McPherson v. Oregon Trunk Ry., supra,* the court stating that the doctrine had no application under the facts of that case, quoted from *Ragolasky v. Nurenberg,* 211 Mass. 575, 98 N.E. 594, where the court said:

> *"We have here the mere occurrence of an accident. To infer from that alone that it was caused by the negligence of the defendants would be to assume the very issue which the plaintiff is obliged to prove.* This is not a case of *res ipsa loquitur,* where we can say that in the ordinary course of things such an accident could not happen unless from careless construction, inspection or use attributable to the employer." (Emphasis supplied)

Likewise, in *See v. Chicago B. & Q. R. Co.* (Mo. App.) 228 S.W. 518, the court stated that the doctrine of *res ipsa loquitur* did not apply because the circumstances and things that happened *in no wise excluded all defensive inferences.* In that case a night watchman

employed to patrol defendant's tracks which were constructed through a cut of solid rock, was struck and injured by the falling of a rock from the side of a deep cut, and there was no evidence as to the cause of the fall of the rock.

In *O'Mara v. Pennsylvania R. Co.,* 95 F.(2d) 762, the court held that the doctrine of *res ipsa loquitur* was not applicable. The court said that while the bolt over which the plaintiff fell or tripped was of a type used by the railroad on the structure of cars, there was no evidence as to how the bolt came to be upon the platform, where plaintiff was walking.

CONCLUSION

The trial court heard the oral evidence of both parties in this action. Having weighed and considered the same insofar as it was necessary to do so to determine whether or not the plaintiff could prevail, the appellate court will not set aside its findings unless they are clearly erroneous or it is found that the trial court erred as a matter of law. Based upon the record in this case there is clearly evidence to support the trial court's findings and conclusions. The judgment entered as a result of said findings and conclusions cannot be set aside merely because the evidence might have been sufficient to submit the case to a jury, if there had been a jury. To hold otherwise would render meaningless and useless the function of the trial judge as a trier of the facts. The trial court's desire to console the appellant and his attorney by indicating to them that he would have taken this case from the jury had there been

one, does not change the fact that no jury was requested and the case was submitted to the court sitting as the trier of the facts. That being so, on appeal appellant is bound by the rules and decisions of the Federal courts pertaining to such appeals.

Based upon the rules and decisions of the Federal courts, the only question before this court is as stated in the appellant's own concise statement of points on appeal, *i.e.*:

> "Whether the court erred in failing to find in favor of the plaintiff and against the defendant on the basis that the evidence conclusively established that defendant was negligent and liable for plaintiff's injuries."

On that issue the trial court clearly did not err. Therefore, the appellee is entitled to an affirmance of the judgment.

Respectfully submitted,

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